YAHYA KASSIM

v.

KERAJAAN MALAYSIA & ANOR

COURT OF APPEAL, KUALA LUMPUR
MAHADEV SHANKAR JCA
ABU MANSOR ALI JCA
DENIS ONG JCA
[CIVIL APPEAL NO: N-01-157-1995]
2 JULY 1997

CIVIL PROCEDURE: *Declaration - Application for - Whether an abuse of the process of the court - Alternative remedies provided by law - Rules of the High Court 1980, O. 53 r. 1A - Certiorari - Time-limit for filing*

PUBLIC SERVANTS: *Reduction in rank - Declaration - Application for declaration that reduction in rank was void - Whether application for declaration an abuse of process - Whether an attempt to evade requirements of O. 53 r. 1A of the Rules of the High Court 1980*

This was an appeal from the refusal of the High Court to grant a declaration that the appellant's reduction in rank was void. The appellant was a senior clerical officer in the State Treasury Office in Seremban. On 26 August 1986, an incident ('the said incident') occurred in the office between the appellant and the head of his department. On 1 September 1986, the appellant was transferred to the District Office at Jempol. On 21 May 1987, the 2nd respondent ('the PSC') issued a show-cause letter to the appellant in respect of the said incident as well as the appellant's absence from the office on various instances in between 11 May 1986 and 30 August 1986. The appellant replied on 16 June 1987, admitting most of the facts in the charges against him, and pleaded leniency. On 14 September 1987, the PSC considered the appellant's representations and decided to reduce his rank to clerical officer. The decision of the PSC was communicated to the appellant on 26 September 1987 and the appellant appealed to the PSC on 10 October 1987. On 21 March 1988, the PSC considered the appellant's appeal and rejected it. This was confirmed by letter on 30 March 1988. On 28 February 1990, the appellant filed a writ praying for a declaration that his reduction in rank was void and for damages. On 19 September 1995, the trial judge dismissed the appellant's action.

Held:
Per Mahadev Shankar JCA

[1] The appellant's action for a declaration was an abuse of the process of the court in that it attempted to evade the clear requirements of O. 53 r. 1A of the Rules of the High Court 1980 ('the RHC').

[2] Pursuant to O. 53 r. 1A of the RHC, applications for *certiorari* must be made within six weeks of the impugned decision. Leave is required before the substantive application may be filed. The failure to apply within the time-limit is usually fatal.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Pengisytiharan - Permohonan untuk - Samada merupakan penyalahgunaan proses mahkamah - Remedi-remedi alternatif yang diberikan oleh undang-undang - Kaedah-kaedah Mahkamah Tinggi 1980, A. 53 k. 1A - Certiorari - Had masa untuk pemfailan*

KAKITANGAN AWAM: *Penurunan pangkat - Pengisytiharan - Permohonan untuk pengisytiharan bahawa penurunan pangkat adalah tak sah - Samada permohonan untuk pengisytiharan merupakan suatu penyalahgunaan proses - Samada suatu percubaan untuk mengelak daripada syarat A. 53 k. 1A Kaedah-kaedah Mahkamah Tinggi 1980*

Ini merupakan rayuan hasil daripada penolakan Mahkamah Tinggi untuk memberikan satu pengisytiharan bahawa penurunan pangkat perayu adalah tak sah. Perayu merupakan seorang pegawai kerani kanan di Pejabat Perbendaharaan Negeri Seremban. Pada 26 Ogos 1986, suatu kejadian telah berlaku ('kejadian tersebut') di pejabat itu antara perayu dan ketua jabatan beliau. Pada 1 September 1986, perayu telah ditukarkan kepada Pejabat Daerah di Jempol. Pada 21 Mei 1987, responden ke-2 ('SPA') telah mengeluarkan surat menunjukkan sebab kepada perayu berhubung dengan kejadian tersebut dan juga ketidak-hadiran perayu di tempat kerja pada beberapa waktu antara 11 Mei 1986 dan 30 Ogos 1986. Perayu telah menjawab pada 16 Jun 1987, dengan mengakui akan kebanyakan daripada fakta-fakta dalam pertuduhan terhadap beliau dan memplid kelonggaran hukuman. Pada 14 September 1987, SPA telah mempertimbangkan representasi-representasi perayu dan membuat keputusan untuk mengurangkan pangkat beliau kepada pegawai kerani. Keputusan SPA telah disampaikan kepada perayu pada 26 September 1987 dan perayu telah mengemukakan rayuan kepada SPA pada 10 Oktober 1987. Pada 21 Mac 1988, SPA telah menimbang rayuan perayu dan menolaknya. Perkara ini telah disahkan melalui surat pada 30 Mac 1988. Pada 28 Februari 1990,

perayu telah memfailkan satu writ memohon untuk mendapatkan suatu pengisytiharan bahawa penurunan pangkat beliau adalah tak sah dan bagi mendapatkan gantirugi. Pada 19 September 1995, hakim perbicaraan telah menolak tindakan perayu.

Diputuskan:
Oleh Mahadev Shankar HMR

[1] Tindakan perayu untuk mendapatkan pengisytiharan merupakan satu penyalahgunaan proses mahkamah kerana ianya cuba untuk mengelakkan syarat-syarat nyata A. 53 k. 1A Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT')

[2] Selaras dengan A. 53 k. 1A KMT, permohonan-permohonan untuk *certiorari* mestilah dibuat dalam tempoh enam minggu daripada keputusan yang diragui itu. Kebenaran diperlukan sebelum permohonan substantif itu boleh difailkan. Kegagalan untuk memohon dalam tempoh masa yang dihad selalunya memudaratkan.

[Rayuan ditolak.]

Cases referred to:
O'Reilly and Others v. Mackman and Ors [1983] 2 AC 237 ***(foll)***
V Paul Raj Chelladurai v. Jabatan Telekom Malaysia Berhad & Ors [1997] 2 CLJ 675 ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19, O. 53 r. 1A

Others sources referred to:
Malaysian Court Practice, MLJ
The Supreme Court Practice, 1997, vol 1, p 844

[Appeal from High Court Malaya, Seremban; Civil Suit No: 21-34-90]

For the appellant - Haresh Mahadevan; Aris Rizal, Christopher Fernando & Co
For the respondent - Mary Lim, State Legal Advisor

JUDGMENT

Mahadev Shankar JCA:

The appellant unsuccessfully applied to the High Court for a declaration that his reduction in rank was void, and for consequential relief including damages. We dismissed his appeal with costs. Our reasons now follow.

The appellant was a senior clerical officer in the State Treasury Office in Seremban. On 26 August 1986 there was an incident in the office between

the appellant and his Head of Department Encik Sofian bin Kochik. On 1 September 1986 the appellant was transferred to the District Office at Jempol. His superior here was the District Officer Ismail bin Dolah Harun.

By a letter dated 21 May 1987 the second defendant (the Public Service Commission (the PSC)) required the appellant to show cause why disciplinary action by way of dismissal or some lesser punishment should not be taken on account of two charges. The first related to the incident aforesaid. It was alleged that the appellant had shouted at Encik Sofian and in the course of doing so had punched the table and broke the glass top thereby committing an act of misconduct. The second charge related to absences from office on 46 diverse dates between 11 May 1986 to 30 August 1986.

On 16 June 1987 the appellant sent a very long four-page letter in answer to the charges. The letter is so very detailed that it cannot be contended that the appellant did not ensure that he made sure he said all he could at that stage. In effect he admitted the facts in the first charge but claimed he had acted on a sudden outburst and without pre-meditation. He did not deny he broke the glass table but said he did so "to emphasise a point". As to second charge he pointed out that of the 46 days listed, one was a Saturday afternoon, one was a Sunday, two were Public Holidays, and three were "rest days". He then listed in detail the mitigating circumstances why he was not at his place of work. He pleaded that the punishment inflicted should not be dismissal but something lighter. His exact words were:

> Oleh yang demikian sekali lagi saya memohon maaf di atas segala perbuatan saya yang telah terlanjur. Saya memohon belas ikhsan tuan agar saya diberikan peluang terakhir. Hukumilah saya dengan lain-lain hukuman yang lebih ringan yang difikirkan patut selain daripada menerima hukuman buang kerja atau pun turun pangkat.

The second defendant considered these representation at a formal meeting on 14 September 1987 and decided that the appellant be punished by a reduction in rank from senior clerical officer to clerical officer. This decision was communicated to him by a letter dated 26 September 1987.

Upon receipt of it the appellant sent an appeal by letter dated 10 October 1987. This is again a very long three-page letter. He now claimed that he only admitted the charges because he was asked to do so by his superior Encik Ismail. His material words are as follows:

> (b) Kenyataan ini tidak saya sebutkan di dalam jawapan saya terhadap pertuduhan tuan melalui SPA. SULIT. 44769/3/10 bertarikh 21.5.1987. Kerana mematuhi dan menghormati nasihat Tuan Pegawai Daerah Jempol selaku Ketua Jabatan saya supaya menjawab semua pertuduhan tuan secara

positif mengaku dan meminta maaf di atas kesalahan yang telah dilakukan. Ini dibuat dengan harapan agar pihak tuan akan menimbangkan hukuman yang lebih ringan daripada menerima hukuman turun pangkat.

Encik Ismail supported the appeal with his own letter dated 13 October 1987 in which he said:

2. Saya mengesahkan kenyataan beliau di para. 3(b) adalah benar dengan harapan agar beliau akan diberi peluang yang akhir sebelum tindakan menurunkan pangkat atau memberhentikan beliau diambil.

The PSC considered this appeal on 21 March 1988 and rejected it. The rejection was confirmed by letter dated 30 March 1988.

At this juncture we wish to draw the attention of all concerned to O. 53 r. 1A of the Rules of the High Court 1980. Applications for *certiorari* must be made within six weeks of the decision which is impugned. Leave is required before the substantive application is filed. The failure to apply within the time limit is usually fatal. There are powerful reasons why these provisions have been enacted. We touched on them in *V Paul Raj Chelladurai v. Jabatan Telekom Malaysia Berhad & Others* [1997] 2 CLJ 675. Practitioners could refer to the commentaries in The Supreme Court Practice 1997 Vol. 1 at p. 844 at seq. and Malaysian Court Practice by MLJ at 53.1.1. – p. 3717 at seq. but quaere para. 53.1.8. – *certiorari* or declaration at p. 3733.

The appellant did not move until 28 February 1990 ie, 29 months later. With the assistance of solicitors he filed a writ with the prayers referred to earlier. The only grounds pleaded in support are that he was not given a full opportunity to make representations in his letter dated 16 June 1987 because he had to rely on his memory to exculpate himself. Nowhere in this letter is there any request for access to any documents to help him to put up his defence. Nor is there anything about his having been induced or pressurised into including material in his letters which he did not believe to be true.

Initially the appellant sued the two respondents above stated and the State Secretary Negeri Sembilan. On 22 August 1990 the first and second respondents filed for summons-in-chambers to strike out the action under O. 18 r. 19, relying on all its limbs including abuse of process. No information has been provided to us as to what happened to this application.

On 25 September 1990 the State Secretary applied by summons-in-chambers to have his name removed. This was heard on 27 July 1993 and an order in terms was made. The action continued against the other two respondents.

The trial took place on 5 September 1995. The appellant gave evidence. He did not call any witnesses. The Principal Assistant Secretary of the relevant section of the PSC also gave evidence. After submissions the trial judge adjourned and gave his decision on 19 September 1995. He dismissed the action with costs.

If the appellant was entitled to ventilate his claims before us we must say we fully agree with everything the trial judge said about this claim.

Quite apart from the fact that the appeal was devoid of merit, we are astonished that the appellant was persuaded to bring it, because it is an abuse of process to resort to an action for declaration and thereby evade the clear requirements of O. 53 r. 1A. Our rules on this subject are almost in *pari materia* with the English rules. The subject has been decided in *O' Reilly and Others v. Mackman and Other* [1983] 2 AC 237. It should suffice to set out the relevant part of the headnote. It reads:

> Held, dismissing the appeals, that since all the remedies for the infringement of rights protected by public law could be obtained on application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a public authority's infringement of his public law rights to seek redress by ordinary action and that, accordingly, since in each case the only claim made by the plaintiff was for a declaration that the board of visitors' adjudication against the plaintiff was void, it would be an abuse of the process of the court to allow the actions to proceed and thereby avoid the protection afforded to statutory tribunals (post, pp. 274H - 275A, 285 D-E, G-H, 286A-C)

It is a pity this action was ever allowed to get off the ground because it was such an obvious non-starter.

Reported by Gan Peng Chiang